No. 68

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

LOCAL 60, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; INDIANAPOLIS AND CENTRAL INDIANA DISTRICT COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; and UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,
Petitioners

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONERS

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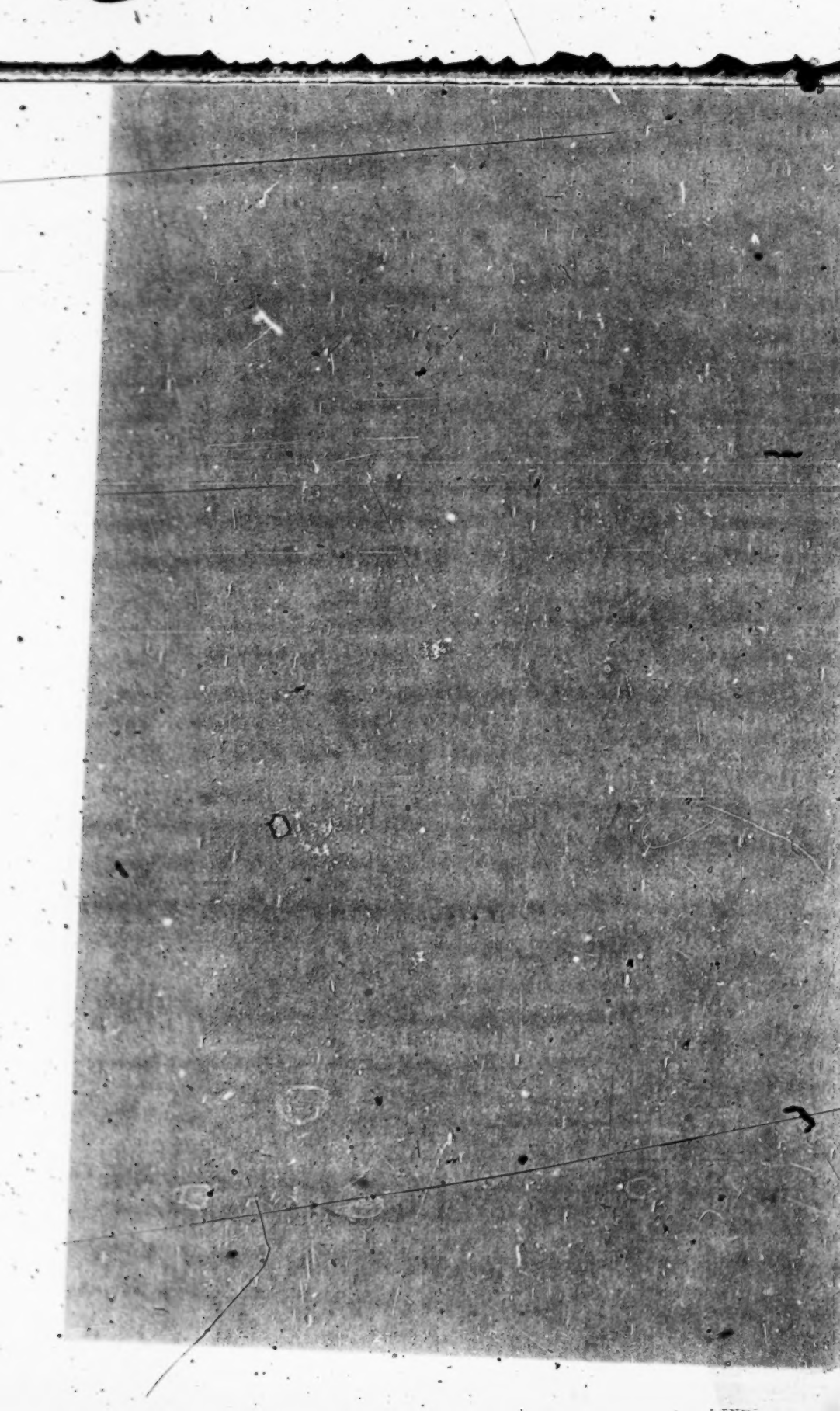

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the employer at a job in Louisville (R. 67, 76). They travelled from Louisville to Indianapolis and applied for employment at the Ford job (R. 66, 76-77). The employer declined to hire them because they were unable to secure referral from Local 60 or the District Council (R. 20-22). It appears that they were denied referral "because . . . too many men" were unemployed in the Indianapolis area and "we were out-of-town men and we couldn't expect to come in the district and go to work" (R. 84)[3]

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[3] The constitution of petitioner District Council provides that "Members coming into this district are required to procure a District Council Working Card and permit, before seeking employment" (R. 90-91, 95, cf. R. 102-104). The practice apparently is, in the distribution of work "to local men over men coming in," that "they always give the local men preference . . . especially if work is hard to get" (R. 48). Apparently too, permits issued to "out-of-town members" have a 30-day duration, and "if there isn't plently of work" at the end of the period "they don't renew them" (R. 48-49).

Section 8(f) of the National Labor Relations Act, enacted in 1959, states explicitly that a prehire agreement in the building and construction industry may provide for priority in opportunity for employment based upon length of service "in the particular geographical area." Labor-Management Reporting and Disclosure Act of 1959, Title VII, Sec. 705, P.L. 86-257, 86th Cong., 1st Sess., 73 Stat. 519, 545. Section 8(f) also specifically confirms the validity in the building and construction industry of the contractual establishment of an exclusive referral system of employment operated by the union. In commenting upon this, the Senate and House Reports both state that "These provisions are not intended to diminish the right of labor organizations and employers to establish an exclusive referral system of the type permitted under existing law." S. Rep. No. 187, 86th Cong., 1st Sess., 28-29, in 1 Leg. Hist. LMRDA 424-425; H. Rep. No. 741, 86th Cong., 1st. Sess., 20, in 1 Leg. Hist. LMRDA 778. What "existing law" permits is before this Court for decision in *Local 357, International Brotherhood of Teamsters* v. *National Labor Relations Board*, No. 64, October Term 1960.

Based on the most recent constitution, the monthly dues payable to the Local Union is $3.50 (R. 95), and the initiation fee is $125 (G.C. Ex. 8,[4] Art. VIII, Sec. 1, p. 21). Lesser dues and fees are payable by apprentices (*ibid.*). Of the initiation fee, $10 is remitted to United Brotherhood, and of the monthly dues, $1.25 is remitted to United Brotherhood (R. 101). A part of the initiation fees and dues is also apparently remitted to the District Council (R. 94, G. C. Ex. 8, Art. VII, Sec. 2, p. 19). The cost of a "Working Permit," payable by a member working within the jurisdiction of a district council who has not transferred his membership to a local union of that council, is "not less than Seventy-five Cents (75¢) per month, nor more than the monthly dues of the Local Union or District Council . . ." (R. 103), a sum he "pays for the services that this district gives him when he gets the permit card" (R. 48).

The Board found that petitioners "violated Sections 8(b)(1)(A) and 8(b)(2) of the Act in maintaining and enforcing an agreement which established closed shop preferential hiring conditions", and "by causing or attempting to cause the Company to refuse to hire" the two applicants (R. 6).[5] In addition to other relief the Board ordered that petitioners (R. 8-9):

Reimburse all employees of Mechanical Handling Systems, Incorporated, in the full amount for

[4] The full text of this exhibit is part of the record before this Court and references to it by exhibit number are to those parts not included in the printed record.

[5] United Brotherhood was not found to have violated Section 8(b)(1)(A) and (2) by causing one of the two applicants to be refused hire because this applicant had not filed a charge against United (R. 6 and n. 2).

all monies illegally exacted from them provided, however, that this Order shall not be construed as requiring reimbursement for any such dues, non-membership dues, assessments, and work permit fees collected more than 6 months prior to the date of service of the original charge against each Respondent herein.

In explanation of the refund requirement, the Board stated that (R. 7):

> Furthermore, as we find that dues, non-membership dues, assessments, and work permit fees, were collected under the illegal contract as the price employees paid in order to obtain or retain their jobs, we do not believe it would effectuate the policies of the Act to permit the retention of the payments which have been unlawfully exacted from the employees.
>
> In addition, therefore, we shall order the Respondents, jointly or severally, to refund to the employees involved the dues, non-membership dues, assessments, and work permit fees, paid by the employees as a price for their employment. These remedial provisions, we believe, are appropriate and necessary to expunge the coercive effect of Respondents' unfair labor practices.

The trial examiner had declined to recommend a refund order, stating that exaction of moneys was "not in any way proven"; he described the General Counsel's basis for requesting a refund as "merely . . . a shot gun blast aimed in the general direction of quarry hoping that game will be brought down" (R. 25).

The Court of Appeals enforced the refund requirement, stating that "we find reimbursement of fees to be a proper and appropriate remedy to restore em-

ployees to the position they would have enjoyed but for the illegal practices" (R. 119).

SUMMARY OF ARGUMENT

The Board's order requires that the union dues and fees be refunded to employees whose employment was subject to a hiring procedure found by the Board to be discriminatory. The refund order is based exclusively upon the finding of a discriminatory hiring procedure. The Board's major premise is that, but for the existence of the discriminatory hiring procedure, the employees would not have acquired or retained union membership, and hence would not have paid union dues and fees.

The Board's premise is fundamentally false. Employees join unions because a "single employee . . . [is] helpless in dealing with an employer. . . . Union . . . [is] essential to give laborers opportunity to deal on equality with their employer." *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U.S. 184, 209. Nothing justifies the different assumption upon which the Board predicates the refund order. It is a commonplace that the building and construction industry is highly unionized and has been for a long time. There is no evidence in this case that the carpenters and millwrights hired to work at the Ford job in Indianapolis were not part of the main stream of long-standing and voluntary union members traditional in the industry. They were all union members when employed. There is no evidence that any joined in contemplation of seeking employment at this job. For all the Board knows or cares they may all have been members for decades. Nor can the Board bridge the gap by arguing that, whatever the voluntary character

of their union membership when they were first hired to work at the project, the employees could not relinquish membership and retain their employment on the job, so that their retention of union membership during this period was coerced. Every reason legitimately stimulating voluntary membership before the job began would operate just as strongly while it lasted.

Since there is nothing to support the Board's assumption that union membership was involuntary, there is nothing to support its cognate assumption that the payment of union dues and fees was involuntary. Experience has demonstrated overwhelmingly that employees who join a union also willingly pay dues and fees to it. The truth is that the Board is indifferent to the actual voluntary character of the payments. As it states, a refund is due "whether or not proof of actual exaction of payments is established." *Local 138, International Union of Operating Engineers*, 123 NLRB 1393, 1409. And so the Board's refund order disregards the precept that "only actual losses should be made good" (*Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 198), and is infected with the vice that it leaves "to mere conjecture to what extent membership . . . was induced by any illegal conduct . . ." (*Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, 238).

Nor is this all. The Board's indifference to the absence of "actual exaction" of union dues and fees is matched by its total obliviousness to the benefits received from the payments, the costs incurred in providing the services, and other cogent factors. The negotiation of an agreement costs money, as does its administration. Dues and fees go towards defraying

the cost. They do not repose in depositories. It may safely be assumed that a refund order requires the return of moneys much of which have already been expended to pay for services. Hence, to require the refund of dues and fees does not simply mean that the employees will have received the benefits of union representation without contributing to defraying their cost. The moneys for reimbursement must come from somewhere, and insofar as the unions are concerned, they must come from the dues and fees paid by other employees working on other jobs. What reimbursement comes down to, therefore, is that the employees who receive a refund will have the benefits they secured from union representation paid for by employees working elsewhere. Moreover, not only does the Board disregard past services, but to drain a union's treasury disables it from as effectively negotiating and administering future agreements, and prejudices as well its capacity to establish and maintain intraunion benefit programs.

The Board disregards all these factors presumably because they are irrelevant to the real reason which actuates its imposition of the refund requirement. The true thrust of the refund order is revealed in the Board's statement that "a mere cease and desist order will have little impact" and the "reimbursement remedy more properly effectuates the purposes of the Act because it provides not only a deterrent to future violations but an incentive to future compliance." *Local 125, United Association*, 125 NLRB No. 107, 45 LRRM 1223, 1224. This statement identifies the precise vice in the use to which the Board puts the refund order. It is patent that the Board is exercising punitive power, although its "power to command affirmative action is

remedial, not punitive." *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, 236. It is patent that the Board is imposing a penalty to coerce compliance, but the "Act does not prescribe penalties or fines." *Republic Steel Corp.* v. *National Labor Relations Board*, 311 U.S. 7, 10. And when the Board invokes the deterrent quality of the order, it suffices to say, with this Court, that "it is not enough to justify the Boards requirements to say they would have the effect of deterring persons from violating the Act. That argument proves too much, for if such a deterring effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end." *Id.* at 12.

Of course nothing in this Court's decision in *Virginia Electric and Power Co.* v. *National Labor Relations Board*, 319 U.S. 533, supports the use to which the refund order is presently put. This Court decided that a refund order was within the Board's power and exercise of the power to require the return of dues and fees paid to a company-dominated union was within the Board's discretion. *Virginia Electric* and this case are thus poles apart. Requiring the refund of fees and dues paid to a company-dominated union in conjunction with its dissolution has nothing in common with ordering a refund of fees and dues paid to a union whose authority to exist and function and to represent employees is altogether unquestioned.

ARGUMENT

An Order Requiring the Refund of Union Dues and Fees to Employees, Based Exclusively Upon a Finding That Their Employment Is Subject to a Discriminatory Hiring Procedure, Is Invalid

In this case and in No. 85 the Board ordered the refund of union dues and fees to employees whose employment was subject to a hiring procedure found by the Board to be discriminatory.[6] The refund order is based exclusively upon the finding of a discriminatory hiring procedure. Neither the actual voluntary character of the payments by the employees, nor the services rendered to them, nor any other factors are deemed relevant by the Board to the appropriateness of the refund order. According to the Board, given a discriminatory hiring procedure, employees are "inevitably coerced" to pay moneys to the union; "the existence of an unlawful contract is sufficient in and of itself to establish the element of coercion"; the refund remedy is therefore without more "applicable to all closed shop and exclusive hiring agreements, . . . whether or not proof of actual exaction of payments is established." *Local 138, International Union of Operating Engineers*, 123 NLRB 1393, 1409; see also, *Local 244, Motion Picture Operators Union*, 126 NLRB No. 46, 45 LRRM 1318. The irrelevance of "actual exaction" is a logical consequence of the Board's view. For, as it has explained, the purpose of the refund order is to provide "a deterrent" to violations and "an incentive"

[6] In this case the order runs against the unions only. In No. 85 the order runs against the union and the employer (R. 42); the Board and the employer in No. 85 entered into a stipulation providing that enforcement of the order against the employer would abide the outcome of judicial review of the order against the union.

to compliance (*Local 425, United Association*, 125 NLRB No. 107, 45 LRRM 1223, 1224):

> . . . we believe that a mere cease and desist order will have little impact in an industry where illegal hiring practices are widespread. The reimbursement remedy more properly effectuates the purposes of the Act because it provides not only a deterrent to future violations but an incentive to future compliance.

Except for the court below, every Court of Appeals which has considered on its merits[7] the validity of a refund order based on a discriminatory hiring procedure has disapproved it, including the Second,[8]

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[7] The refund order was before the First Circuit in two cases, but the ruling in neither instance reached the merits. In the first case, the court disapproved it as "an ex post facto penalty" because of its retroactive application to conduct not deemed unlawful when it took place. *National Labor Relations Board* v. *Local 176, United Brotherhood of Carpenters*, 276 F. 2d 583, 586. In the second case, the court enforced a refund order in the absence of exceptions to its recommendation in the trial examiner's intermediate report. *National Labor Relations Board* v. *Local 111, United Brotherhood of Carpenters*, 278 F. 2d 823.

[8] *Morrison-Knudsen Co.* v. *National Labor Relations Board*, 275 F. 2d 914, 917-918, certiorari pending, No. 120, October Term 1960; *Building Material Teamsters, Local 282* v. *National Labor Relations Board*, 275 F. 2d 909, 911-913.

Third,[9] Fifth,[10] Eighth,[11] Ninth,[12] and District of Columbia Circuits.[13] The tenor of judicial evaluation of the order is readily discernible. The Second Circuit stated that it was "unduly harsh and penal" (275 F. 2d at 917), "inappropriate and arbitrary" (*id.* at 918); and entered "more or less routinely and with regular incantation of the same words . . ." (*id.* at 912). The Third Circuit stated that it "appears to be nothing more than a fine which, in this instance, is paid into private, rather than public, coffers" (278 F. 2d at 900). The Fifth Circuit stated that it is "a windfall to the employees and an unjust penalty to the Union" (277 F. 2d at 222). And the Ninth Circuit stated that it "is punitive, penal, non-remedial and an unauthorized re-

[9] *National Labor Relations Board* v. *United States Steel Corp.*, 278 F. 2d 896 (en banc), certiorari pending, No. 228, October Term 1960; *National Labor Relations Board* v. *American Dredging Co.*, 276 F. 2d 286, certiorari pending, No. 123, October Term 1960; *Lakeland Bus Lines* v. *National Labor Relations Board*, 278 F. 2d 888; *National Labor Relations Board* v. *Local 1566, International Longshoremen's Assn.*, 278 F. 2d 883, certiorari pending, No. 285, October Term 1960.

[10] *National Labor Relations Board* v. *Local Union No. 85, Sheet Metal Workers Assn.*, 274 F. 2d 344, 346, certiorari pending, No. 89, October Term 1960; *National Labor Relations Board* v. *Millwrights' Local 2232*, 277 F. 2d 217, 222, certiorari pending No. 229, October Term 1960; *National Labor Relations Board* v. *Local Union No. 450, International Union of Operating Engineers*, 46 LRRM 2611, 2614-15 (July 12, 1960).

[11] *National Labor Relations Board* v. *International Union of Operating Engineers, Local 382-382A*, 46 LRRM 2544, 2548-49 (June 29, 1960).

[12] *Morrison-Knudsen Co.* v. *National Labor Relations Board*, 276 F. 2d 63, 73-76.

[13] *Local 357, International Brotherhood of Teamsters* v. *National Labor Relations Board*, 275 F. 2d 646, 647, certiorari granted, No. 85, October Term 1960; *Puerto Rico S. Assn.* v. *National Labor Relations Board*, 46 LRRM 2496, 2498 (June 23, 1960).

quirement of payment to third persons not shown to have been in any manner damaged by the asserted unfair labor practice" (276 F. 2d at 76).

We turn to show that this judicial evaluation accurately appraises the refund order.

I. THE PREMISE OF THE REFUND ORDER IS THAT EMPLOYEES DO NOT JOIN UNIONS AND PAY DUES EXCEPT TO ESCAPE UNION DISCRIMINATION AGAINST THEM.

The Board justifies the refund of union dues and fees as an order appropriate to the finding of a discriminatory hiring procedure by a process of reasoning from an inference "piled upon an inference, and then another inference upon that. . . ."[14] But for the existence of the discriminatory hiring procedure, the argument runs, employees would not be required to obtain or retain union membership in order to acquire or keep employment; given a discriminatory hiring procedure, therefore, employees become and remain union members to escape discrimination; since union membership was induced by fear of discrimination, the payment of dues and fees as an adjunct of union membership was likewise the product of such fear; and so, the argument concludes, the existence of the discriminatory hiring procedure "inevitably coerces employees to become or remain union members and to make payments to the union," and therefore the dues and fees should be refunded. *Local 125, United Association*, 125 NLRB No. 107, sl. op. pp. 2-3, 45 LRRM 1223. The Board's doctrine of "inevitable coercion" is so inexorable that an offer of proof that payments were voluntary, unrelated to the hiring procedure, is rejected. "We do not be-

[14] *Interlake Iron Corp. v. National Labor Relations Board*, 131 F. 2d 129, 133 (C.A. 7).

lieve," states the Board, "that testimony by union members as to their joining or remaining members of the union is, in a context such as this, sufficiently persuasive to warrant a different result here." *Ibid.*[15]

1. *The basic fallacy:* The fundamental vice in the Board's position is that it assumes, in disregard of the whole history of the growth of the labor movement, that employees have no important incentive to join a union except to escape its presumed discrimination against them. Most of us have supposed that the reason for union membership is somewhat different. In 1921 this Court stated what was already then a commonplace (*American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U.S. 184, 209):

> [Labor unions] were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. They

[15] "One of the subsidiary attacks which the union makes on this order is that the Board refused to reopen the case and permit the union to offer testimony from employees that they were not coerced. Counsel for the Board, in argument here, says the reason for that refusal was that the evidence would be irrelevant. The union says that this shows that the Board's premise is that 'no working man would join a labor union and pay dues to it unless he was compelled to do so by a closed shop agreement or practice.' Counsel for the Board concedes that the presumption of coercion is a conclusive one once the unfair labor practice is shown." *National Labor Relations Board* v. *United States Steel Corp.*, 278 F. 2d 896, 899 (C.A. 3), certiorari pending, No. 228, October Term 1960.

united to exert influence upon him and to leave him in a body, in order, by this inconvenience, to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth.

In fostering union organization and collective bargaining, the Act is based on the premise that these are needed to redress the "inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association . . ." (Sec. 1, para. 2). Through union membership and collective bargaining employees seek and secure the benefits of employment standards "which reflect the strength and bargaining power and serve the welfare of the group." *J. I. Case Co. v. National Labor Relations Board*, 321 U.S. 332, 338.

Experience has demonstrated overwhelmingly that employees who join a union also voluntarily pay union dues and fees to it. When the 1947 amendments to the Act were adopted, the proviso to Section 8(a)(3) was amended to provide that a union security agreement, obligating the employees covered by the agreemnt to pay union dues and initiation fees, could only be valid "if, following the most recent election held as provided in Section 9(e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement. . . ." This requirement was repealed on October 22, 1951 (Public Law 189, 82d Cong., 1st Sess.), it having proved "burdensome and unnecessary." *National Labor Relations Board v. Gaynor News Co.*, 197 F. 2d 719, 724 (C.A. 2).

affirmed, 347 U.S. 17. Its pointlessness was manifest from the results of the union-shop authorization polls conducted by the Board. "During the 4 years and 2 months, from 1947 to 1951, in which a union-shop authorization poll was required by the act before a valid union-shop agreement could be made, the Board conducted 46,119 such polls. Negotiation of union-shop agreements was authorized by vote of the employees in 44,795 of these polls. This was 97 percent of those conducted."[16] For the fiscal year ending June 30, 1951, of 1,335,683 valid votes cast in such referendums, 1,164,143, or 87.2%, of the employees, voted in favor of the union shop.[17] The same was true of the preceding years. In 1950, of 900,866 valid votes, 89.4% favored the union shop;[18] in 1949, of 1,471,092 valid votes, 93.9% favored the union shop;[19] in 1948, of 1,629,330 valid votes, 94.2% favored the union shop.[20]

This overwhelming demonstration that employees voluntarily favor the adoption of union security agreements forever put the quietus to the notion that dues and fees are unwillingly paid. These agreements operate compulsively only as to that small group known as "'free riders,' *i.e.*, employees who receive the benefits of union representaion but are unwilling to contribute their share of financial support to such union. . . ." *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 41. Such agreements are the means by which a majority of the employees can re-

[16] N.L.R.B., Sixteenth Annual Report, p. 10 (1951).

[17] *Id.* at 306 (1951).

[18] N.L.R.B., Fifteenth Annual Report, p. 235 (1950).

[19] N.L.R.B., Fourteenth Annual Report, p. 172 (1949).

[20] N.L.R.B., Thirteenth Annual Report, p. 111 (1948).

quire a negligible minority to pay their own way. But that the vast majority willingly pays was demonstrated by their willing authorization of a contractual obligation to pay.

Consideration of circumstances particularly relevant to this case and to No. 85 emphasizes the voluntary nature of union membership and dues payment.

2. *The circumstances particularly relevant to this case:* The employer and the unions in this case are part of the building and construction industry and the Ford job at Indianapolis was a construction project. It is a commonplace that the building and construction industry is highly unionized and has been for a long time. As of 1927, "The combined membership of the seventeen international labor organizations [in the building and construction industry] in 1927 was more than 950,000 and at one time it had passed the million mark. In many large cities the building construction workers are, for all practical purposes, completely organized. In other cities their claim to an organized strength varying from 60 to nearly 100 percent of building workers, cannot be seriously disputed."[21] A study of the extent of organization in the building and construction industry in sixteen cities in 1952 showed that, "In all sixteen cities surveyed in the summer of 1952, union strength in commercial, industrial, public, and semi public work was close to 100 per cent, with large apartment buildings only slightly weaker."[22] A May 19, 1960 report of the Legislative Reference Serv-

[21] Haber, Industrial Relations In The Building Industry, 325-326 (1930).

[22] Haber and Levinson, Labor Relations and Productivity In The Building Trades, 35 (1956).

ice of the Library of Congress to members of Congress stated that:[23]

> The [building and construction industry] is highly organized and according to the Bureau of Labor Statistics about 2.3 million of the 2.6 million employees in the contract construction industry in 1958 belonged to these twenty unions. This estimate may, however, exaggerate union membership since it is based on union claims and also includes unemployed workers as well as some who may have retired but still are maintained on union rolls. (Directory of National and International Labor Unions in the U.S., Dec. 1959. Bureau of Labor Statistics. Bulletin No. 1267, Table 7, p. 12).
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> The National Bureau of Economic Research estimated that in 1953 union membership in the building and construction industry accounted for 84 percent of total employment. According to this study, union membership in 1953 accounted for 2,198,000 out of the total 2,622,000 persons engaged in the construction industry. (Leo Troy, Distribution of Union Membership Among the States, Occasional Paper No. 56, 1957, Tables 6, p. 24).

In 1959, in passing Section 8(f) of the National Labor Relations Act authorizing entry into prehire agreements in the building and construction industry, Congress acted in reliance upon the known high state of union membership in that industry. Section 8(f) supersedes the general rule that an employer and a union may not enter into an exclusive collective bargaining agreement covering a group of employees when that group of employees is rapidly expanding, so that the initial work force cannot truly represent more than

[23] Levitan, Common Site Picketing in Construction, 46 LRR 138, 139.

a small fraction of the contemplated total. . . ."[24] Congress eliminated that rule in the building and construction industry by providing in section 8(f) that "It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in Section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement. . . ."[25] An important reason supporting the enactment of Section 8(f) was the practical assurance that because of the high degree of union membership in the industry the contracting union would in fact be the chosen representative of the present and future employees for whom the union acted. As the Senate Report states, "A substantial majority of the skilled employees in this industry constitute a pool of such help centered about their appropriate craft union. If the employer relies upon this pool of skilled craftsmen, members of the union, there is no doubt under these circumstances that the union will in

[24] *National Labor Relations Board* v. *Guy F. Atkinson Co.*, 195 F. 2d 141, 144 (C.A. 9), affirming in this respect, 90 NLRB 143, 145.

[25] Sec. 705(a), Title VII, Labor-Management Reporting and Disclosure Act, 1959, P.L. 86-257, 86th Cong., 1st Sess., 73 Stat. 519, 545.

fact represent a majority of the employees eventually hired."[26]

There is no evidence in this case that the carpenters and millwrights hired to work at the Ford job in Indianapolis were not part of this main stream of long-standing and voluntary union members traditional in the building and construction industry. They were all union members when employed. There is no evidence that any joined in contemplation of seeking employment at this project. For all the Board knows or cares they may all have been members for decades. "No effort was made to even show when these men joined the union. Practically all of them may have belonged for years. . . . It would be surprising if many of these men had not been members of the union or some of its branches for many years. At any rate, nothing is shown in this record to negative that probable situation" *Morrison-Knudsen Co.* v. *National Labor Relations Board*, 276 F. 2d 63, 74 (C.A. 9).

The Board contends (*Local 425; United Association*, 125 NLRB No. 107, 45 LRRM 1223, 1224), and the court below agrees (R. 118-119), that whatever the voluntary character of their union membership when they were first hired to work at the project, the employees could not relinquish membership and retain their employment on the job, and so their retention of union membership during this period was coerced. This is as fanciful as the original assumption that the employees were coerced to become union members in the first place. An employee who voluntarily joins a union has no reason to leave it so long as he continues to

[26] S. Rep. No. 187, 86th Cong., 1st Sess., 28, in 1 Leg. Hist. LMRDA 424.

work in the trade in the absence of an intervening event which is forcefully disenchanting. The same inclination that prompted him to join would prompt him to remain. In fact the longer he is a member the less likely is it that he would cease to be. And union membership is so natural an attribute of the craftsman in the building and construction industry that what would be unnatural to him would be the thought of relinquishing it.[27] Finally, since the member is part of the class of employees whose employment on the job is protected from the competition of nonmembers, he would regard a system of employment based on union membership as a service to him rather than coercive of him.

In short, the Board's doctrine of "inevitable coercion" is a euphemism for the view that the absence of actual coercion is not material. In the Board's own words, dues and fees are to be refunded "whether or not proof of actual exaction of payments is established." *Local 138, International Union of Operating Engineers*, 123 NLRB 1393, 1409.[28]

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[27] ". . . [T]he building trade unions constitute the largest and in some cases, the only pool of available skilled labor." Quinn, *Prehire Problems in the Construction Industry*, 48 Geo. L. J. 380 (1959). "Many employers in the industry at one time were rank-and-file members, and although they left the ranks to become contractors, they still retained their union cards and followed the practices they had learned as union men." Apruzzese, *Prehire and the Local Building Contractor*, 48 Geo. L. J. 387, 394 (1959).

[28] The Board's departure from reality is vividly illustrated in the memorandum in opposition to certiorari in *National Labor Relations Board* v. *American Dredging Co.*, No. 123, October Term 1960. In that case, to support the refund order, the Board made its routine, mechanical finding that the employees were "inevitably" coerced. 123 NLRB 139, 142. The employees, however, apparently did not share the Board's impression of their sub-

3. *The circumstances particularly relevant in No. 85:* Consideration of the circumstances particularly relevant in No. 85 again demonstrates the total absence of a firm foundation for the refund order. In No. 85 the sole basis for the Board's conclusion that a discriminatory hiring procedure existed is that the agreement establishing the dispatching service for the hire of casual employees did not contain the three requirements devised by the Board as essential to the validity of a union's operation of an exclusive referral system of employment.[20] Had the agreement contained the three requirements no basis for a finding of a violation would exist. Consequently, the validity of the refund order depends upon whether it is appropriate to redress the omission of the three requirements from the agreement.

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jugated state. "On May 5, 1960, the Board held a consent election in which 491 employees voted, i.e., approximately 90% of those eligible, and 401 employees voted to have the Union as their collective bargaining representative." Memorandum in Opposition, p. 5.

[20] As stated by the Board (*Mountain Pacific Chapter of the Associated General Contractors*, 119 NLRB 883, 897, remanded, 270 F. 2d 425 (C.A. 9)):

> . . . we would find . . . [a hiring hall] agreement to be nondiscriminatory on its face, only if the agreement explicitly provided that:
>
> (1) Selection of applicants for referral to jobs shall be on a nondiscriminatory basis and shall not be based on, or in any way affected by, union membership, by-laws, rules, regulations, constitutional provisions, or any other aspect or obligation of union membership, policies, or requirements.
>
> (2) The employer retains the right to reject any job applicant referred by the union.
>
> (3) The parties to the agreement post in places where notices to employees and applicants for employment are customarily posted, all provisions relating to the functioning of the hiring arrangement, including the safeguards that we deem essential to the legality of an exclusive hiring agreement.

To justify the refund the Board argues from its presumption that a union will operate the referral system discriminatorily to its intermediate premise that employees therefore join the union in order to safeguard their opportunity for employment. Since, the argument goes on, the act of joining the union was induced by fear of discrimination, payment of union dues and fees as an adjunct of union membership was the product of that illegal inducement. The argument concludes that the dues and fees should therefore be refunded.

The threshold objection to this line of reasoning is that the Board ignores the logic of its original premise. If, as the Board presumes, the union will operate the referral system discriminatorily in disregard of the statute, what is there to say that the union will not operate it discriminatorily despite the incorporation of the three requirements into the agreement? Such incorporation would, under the Board's view, validate the operation of a referral system. Yet every step in the process of reasoning by which the Board would justify the refund is just as cogent whether the three requirements are in the agreement or not. The same supposed propensity to discriminate, the same supposed fear of it, and the same supposed consequent inducement to join would all still subsist. The Board can hardly justify a refund order, where the alleged wrong is based upon the omission from the agreement of the three requirements, upon a line of reasoning which would hold just as true even if the omission were rectified.

The second objection is that there is no evidence of a causal connection between operation of the dispatching service by the union and membership in

it. There is no evidence in the record as to the time that any casual employee joined the union. The agreement providing for the operation of the dispatching service was entered into on May 1, 1955 (R. 62). For ought that the record shows, every casual employee joined the union well before then, and well before the operation of any dispatching service. They surely did not all join on or after the commencement of the referral system of employment. But the Board assumes just that. For if the employees joined the union *before* the operation of the dispatching service began, there is no basis for the Board's assumption that the employees joined in order to protect their employment from discriminatory operation of the dispatching service. Membership which *preceded* the dispatching service could not have been caused by it. The Board assumes this critical fact—that membership followed rather than preceded the dispatching service—without an iota of evidence to support the assumption. Nor can the Board bridge the gap by arguing that, regardless of the voluntariness of the original inception of membership, continuance in membership was coerced by the inauguration of the dispatching service. Every reason legitimately stimulating voluntary membership before the beginning of the dispatching service would operate just as strongly afterwards (*supra*, pp. 21-22).

This returns us to the fundamental vice in the Board's position. The Board assumes that the casual employees had no important incentive to join the union except to escape its presumed discrimination against them. But there is no evidence to support an assumption that in this case the union membership of the casual employees was not part of the main stream of

willing participation in the labor movement. The union was one of fifteen local unions united to bargain collectively on an industry-wide basis with an association representing about one thousand employers (R. 55, 59-60; 62-66). Membership in the union contributed to the "strength and bargaining power [and] serve[d] the welfare of the group."[39] The Board cannot assume without evidence that the casual employees did not voluntarily join the union in order to be part of that group.

Finally, as the examiner stated, "No question is raised as to the Union's representative status . . ." (R. 49). This means that it is uncontested that the union is the free choice of a majority of the employees. Experience has demonstrated overwhelmingly that employees who choose to be represented by a union in collective bargaining also choose to pay union dues and fees to it (*supra*, pp. 16-17). Yet the Board states that the casual employees paid dues and fees to the union unwillingly. And it states this despite the fact that the union security provision of the agreement in this case was inapplicable to the casual employees. For that provision stipulates, as the law requires, that continued employment is conditioned upon union membership only "after thirty (30) days from the effective date of this Agreement, or after thirty (30) days from the date an employee is hired, whichever is later . . ." (R. 62). This provision can never be applied to a casual employee. His period of continuous employment with a particular employer never exceeds part of a week and customarily lasts only one day or part of a day (R. 9-10, 30-31); the casual employee

[39] *J. I. Case Co.* v. *National Labor Relations Board*, 321 U.S. 332, 338.

therefore never works "thirty (30) days from the date" he "is hired"; and hence the precondition to applicability of the union security agreement to him can never be realized. Thus the casual employee's payment of union dues and fees cannot even be said to have been contractually compelled. It is then surely fictive for the Board to say that the casual employees were "inevitably" coerced into paying dues and fees (R. 40).

4. *The upshot:* "Since only actual losses should be made good" (*Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 198), the Board trips at the threshold in requiring the refund of dues and fees "whether or not proof of actual exaction of payments is established." *Local 825, International Union of Operating Engineers*, 123 NLRB 1393, 1409. To return a voluntary payment is not to make the employee whole but to make him the beneficiary of a windfall. And so the law has long established the rule that damages are not recoverable unless they are "the certain result of the wrong," "definitely attributable to the wrong. . . ." *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 562. "Certainty in the fact of damage is essential." *Palmer* v. *Connecticut R. & L. Co.*, 311 U.S. 544, 561. See also, *Talon, Inc.* v. *Union Slide Fastener, Inc.*, 266 F. 2d 731, 736-737 (C.A. 9). No one "may properly seek to secure something from another without . . . demonstrating pecuniary loss springing from or consequent upon the unlawful act." *Beegle* v. *Thompson*, 138 F. 2d 875, 881 (C.A. 7), cert. denied, 322 U.S. 73. To refund dues and fees to an employee, for which he has received services, without a solid showing that he involuntarily paid

them, is not to make him whole but to enrich him unjustly.[31]

In short, as with any other remedial order, so with a refund order, it must be shown to justify it that the order eradicates "a *consequence* of the unfair labor practices found by the Board . . ." *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197, 236. And, in this case and in No. 85, as in the generality of cases which these two typify, it simply does not stand established that the union membership of the employees, and their payment of dues and fees, were the consequence of the operation of a hiring procedure found by the Board to be discriminatory. It "is left to mere conjecture to what extent membership . . . was induced by any illegal conduct. . . ." *Id.* at 238. The union "was entitled to form" its organization. It was "entitled to solicit members and the employees were entitled to join. These rights cannot be brushed aside as immaterial for they are of the very essence of the rights which the Labor Relations Act was passed to protect and the Board could not ignore or override them in professing to effectuate the policies of the Act. To say that of the . . . [employees] who did join there were not those who joined voluntarily . . . would be to indulge an extravagant and unwarranted assumption." *Ibid.*

[31] Nor will it do for the Board to say that we are invoking a rule of damages relevant to private injury but not germane to the public character of the rights created by the Act. The rule has its most frequent application in antitrust litigation, and one would be hard put to say whether the antitrust laws or the National Labor Relations Act have a more distinctively public character. See *Radovich v. National Football League*, 352 U.S. 445, 453-454 and n. 10; *Rogers v. Douglas Tobacco Board of Trade, Inc.*, 266 F. 2d 636, 644 (C.A. 5).

II. THE BOARD DISREGARDS THE BENEFITS RECEIVED FROM DUES AND FEES, THE COSTS INCURRED IN PROVIDING THE SERVICES, AND OTHER COGENT FACTORS.

The Board's indifference to the absence of "actual exaction" of union dues and fees is matched by its total obliviousness to the benefits received from the payments, the costs incurred in providing the services, and other cogent factors. In view of the Board's major premise that union membership is to be attributed to the employees' apprehension of union discrimination, it is perhaps not surprising that the Board should forget that there are genuine advantages to union membership. Consideration of what the Board forgets—and surely has not evaluated—further demonstrates the invalidity of its refund order.

Employees voluntarily pay union dues and fees because they know they cannot have the benefits of union representation without contributing to defrayal of the expense. The negotiation and administration of an agreement cost money. Effective representation requires a full-time paid staff, at the international level at least if not also at the local level. Preparing and presenting a case in arbitration is not inexpensive; and arbitrators must be paid.

Dues and fees go towards defraying the cost. They do not repose in depositories accumulating compound interest. They pay for services. It is safe to assume that a refund order requires the return of dues and fees much of which have already been expended. Hence, to require the refund of dues and fees does not simply mean that the employees will have received the benefits of union representation without contributing to defrayal of their cost. The moneys for reimbursement must come from somewhere, and insofar as the

unions are concerned, they must come from the dues and fees paid by other employees working on other jobs. What reimbursement comes down to, therefore, is that the employees who receive a refund will have the benefits they secured from union representation paid for by employees working elsewhere. We find it hard to believe that this serves to effectuate any policy of the Act.

Furthermore, the refund of dues and fees not only disregards the cost of past services, it impairs the capacity of the union to render future services. To drain a union's treasury is, to the extent of the drain, to disable it from functioning as effectively in negotiating and administering future agreements. Should a strike be necessary to consummate a satisfactory settlement, the wherewithal to pay strike benefits and defray other costs may have been destroyed or prejudicially curtailed. In addition, aside from the negotiation and administration of an agreement, unions undertake to provide for their members many valuable benefits which are intraunion in character. Death or disability plans, mutual insurance, medical care, institutions for the aged and the infirm, and vacation facilities are among these.[32] To drain the union's treasury by requiring the refund of dues and fees may seriously jeopardize its ability to meet existing commitments and prudently to undertake additional benefit programs. This too does not serve to effectuate any policy of the Act.

This case is illustrative. The constitution of United Brotherhood provides for the payment of strike benefits (R. 112-113). So does that of the District

[32] See Barbash, The Practice of Unionism, 300-304 (1956).

Counsel (G.C. Ex. 8, Strike Rule 7, p. 53). The constitution of United Brotherhood also establishes numerous intraunion benefits. A funeral donation is provided for in the event of the death of a member or his spouse (R. 105-107). A disability donation is payable in the event of accidental injury (R. 107-111). A home for aged members is maintained at Lakeland, Florida (R. 97, 111). In lieu of entering the home, pensions are payable (R. 111). For the four year period ending December 31, 1953, United Brotherhood paid $669,944.65 in strike benefits, $9,383,350.24 in death and disability donations, $11,948,310 in pensions; and the cost of maintaining the home for the aged was $1,300,177.17.[33]

The Board not only ignores the benefits the member received in the past, but its refund order also places the member himself in an impossible predicament. The constitution constitutes a contract between the member and the union.[34] The member pays fees and dues in fulfillment of his part of the bargain. If the fees and dues he paid are returned to him, his membership in the union is necessarily severed (R. 102). If he wishes to rejoin, he is not only subject to the expense of a "readmission fee," but he "may be readmitted only as a new member . . ." (R. 102). And since eligibility for intraunion benefits, and the amount of the benefit, are based on the length of union mem-

[33] Proceedings of the Twenty-Seventh General Convention of the United Brotherhood of Carpenters and Joiners of America, November 15-19, 1954, pp. 169, 178, in evidence as General Counsel's Exhibit No. 21 in the record in *United Brotherhood of Carpenters and Joiners, et al.*, 125 NLRB No. 81.

[34] See *International Association of Machinists* v. *Gonzales*, 356 U.S. 617, 618.

bership (R. 106-111), readmission as a "new member" defers eligibility for intraunion benefits and may result in diminishing the amount of the benefit ultimately received. The Board has not yet addressed itself to the dilemma of the member who is the recipient of a refund but who prefers the advantages of continuing his membership in the union.

A final incongruity should be noted. Apparently, in this case, United Brotherhood, the District Council, and the Local Union are each individually responsible for refunding to the employees the full amount of the fees and dues paid by the employees for the period beginning six months preceding the filing of the unfair labor practice charge (R. 7, 8-9). Yet United Brotherhood and the District Council never received the full amount, and the Local Union never retained the full amount, each being entitled to but a designated share of the whole (*supra*, p. 5). To be muleted of moneys which one has never even had is beyond the tolerance of any concept of remedial relief.

The Board's rationale is devoid of mention, much less consideration, of any of these factors. The Board has failed in its obligation "of taking fair account . . . of every socially desirable factor in the final judgment." *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 198. It enters a refund order with the discriminating discernment of "a shotgun blast. . . ." *National Labor Relations Board* v. *United States Steel Corp.*, 278 F. 2d 896, 901 (C.A. 3), certiorari pending, No. 228, October Term, 1960.

III. THE REFUND ORDER IS PUNITIVE IN PURPOSE.

The true thrust of the refund order is revealed in the Board's statement that "a mere cease and desist order will have little impact" and the "reimbursement remedy more properly effectuates the purposes of the Act because it provides not only a deterrant to future violations but an incentive to future compliance." *Local 425, United Association*, 125 NLRB No. 107, 45 LRRM 1223, 1224. The real reason for the refund requirement is thus to coerce compliance. It is "nothing more than a fine which, in this instance, is paid into private, rather than public, coffers." *National Labor Relations Board* v. *United Steel Corp.*, 278 F. 2d 896, 900 (C.A. 3), certiorari pending, No. 228, October Term 1960.

In the posture typified by this case and No. 85, the refund order has come to be known as the *Brown-Olds* remedy, the name being derived from the case decided on February 28, 1956, in which the current version of the refund order was devised. *Brown-Olds Plumbing and Heating Corp.*, 115 NLRB 594. In its present form the refund order drastically departs from the limitations which cabined its use in the past. As the General Counsel of the Board[35] has explained, what the Board has done "was to extend the broad reimbursement order, theretofore reserved for Section 8(a)(2) situations, to payments coerced under illegal union security or hiring arrangements with any unions even if not employer-dominated or supported." Address, June 27, 1958, 42 LRRM 101, 102.

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[35] All references in this brief to the General Counsel are to Jerome D. Fenton and to statements made by him during his term of office from March 4, 1957 to June 26, 1959.

The attribute of the order which lends it to punitive application is the staggering financial liability it entails. This can be quickly illustrated. Assume a local union with a membership of two thousand all covered by one agreement. Assume further a monthly dues rate of four dollars, giving the local a monthly income from dues of eight thousand dollars. A contested proceeding before the Board, from the filing of the charge through the enforcement of the order by a Court of Appeals, usually takes about three years. Since the liability to refund the dues begins to run from the date six months preceding the filing of the charge, an enforced refund order against a local union of two thousand members paying four dollars per month would require the payment of $280,000. Nor does this take into account initiation fees received during the period. And the liability is fantastically multiplied if the union is a party to a multi-employer contract. As the Board has said (*Local 138, International Union of Operating Engineers*, 123 NLRB 1393, 1409-10):

> In cases involving multi-employer contracts in which the contracting union and one or more employers are named respondent parties to the contract, the union's liability for reimbursement of sums unlawfully exacted also shall extend to all employees covered under such contract found unlawful; each named employer respondent shall be liable jointly and severally with the union for the reimbursement of sums paid by its own employees. Although a collective-bargaining contract may extend to employees of more than one employer, the limitation upon the liability of a particular employer derives from the fact that an employer participates in a contract only to the extent its own employees are involved. On the other hand, a union which maintains contractual relations with one or more employers participates to

> the full extent of the contract's coverage. Accordingly, it would seem reasonable and logical that a union's liability for reimbursement extend to all employees of all employers unlawfully coerced by the union's contract into paying monies to the union.

It is therefore apparent that a union and an employer can resist yielding to the Board's conception of a valid union security or hiring agreement only at the risk of staggering financial loss should the Board prevail. This is the lever which the Board has deliberately exploited to coerce compliance. Thus, on February 7, 1958, the General Counsel of the Board wrote to the Building and Construction Trades Department, AFL-CIO, Associated General Contractors, and National Contractors Association, advising them "to correct" their hiring arrangements within three months under pain of application of the *Brown-Olds* refund order if they did not (5 CCH Lab. Law Rep. ¶ 50,060 (old edition)):

> As you know, the Board, commencing with the *Brown-Olds* case, 115 NLRB 594, has held that where illegal hiring arrangements exist, either pursuant to a contract or practice, the appropriate remedy, in addition to the usual remedial provisions, requires the reimbursement of all monies, including initiation fees, dues, permit fees, assessments, "dobies," and the like, collected pursuant to such arrangements. The purpose of the Board in applying the so-called *Brown-Olds* reimbursement remedy is to effectuate the policies of the Act by, among other things, prevailing upon employers and unions to correct their illegal hiring arrangements.
>
> It would be preferable, of course, if the parties took it upon themselves to correct their illegal hir-

ing arrangements, thereby achieving the same basic purpose sought by the Board but without the necessity of Board action. Such overall elimination of illegal hiring arrangements, by voluntary action, would not only help effectuate the purposes of the Act, but would clearly be an important step in the general public interest and in the furtherance of the fundamental rights of employees.

With this thought in mind, I would like to suggest that during a period of three months, commencing March 1, 1958, employers and unions, who are party to illegal hiring arrangements, vigorously undertake to correct such arrangements by bringing them into compliance with the provisions of the Labor Management Relations Act of 1947. If this is done, it may warrant the disposition, without full application of the *Brown-Olds* reimbursement remedy, of charges based upon illegal hiring arrangements which have been voluntarily conformed to the provisions of the Act during the period prior to June 1, 1958. It will also warrant my recommending to the Board during such period a similar disposition of all cases currently pending or brought before the Board with respect to such illegal hiring arrangements. It is understood, however, that apart from the non-application of the *Brown-Olds* reimbursement remedy, all charges and cases relating to or arising out of illegal hiring arrangements must be processed in normal fashion although such arrangements may have been corrected during the period prior to June 1, 1958.

The Office of the General Counsel will be pleased to cooperate with employers and unions in this matter.

Thereafter, on April 1, 1958, the Board issued its decision in *Mountain Pacific Chapter of the Associated General Contractors*, 119 NLRB 883, remanded, 270

F. 2d 425 (C.A. 9), in which it formulated the three requirements for inclusion in agreements establishing hiring halls (*supra*, p. 23 and n. 29). Significantly, the order in *Mountain Pacific* did *not* require the refund of dues and fees.' Nevertheless, on April 23, 1958, three weeks after *Mountain Pacific* had issued, the General Counsel wrote another letter, this time to the Associated General Contractors, National Contractors Association, and National Electric Contractors Association, extending the moratorium for application of the *Brown-Olds* remedy from June 1, 1958 to September 1, 1958, and adverting to the establishment in *Mountain Pacific* of "certain legal requirements for exclusive hiring arrangements" (5 CCH Lab. Law Rep. ¶50,074 (old edition)):

> On February 7, 1958, this Agency announced that during the period March 1 to June 1, 1958, it would withhold full application of the *Brown-Olds* reimbursement remedy where employers and unions voluntarily bring their union-security and hiring arrangements into conformity with the provisions of the Labor Management Relations Act, 1947.
>
> Since then we have been advised that a number of unions and employers are vigorously undertaking to bring their union-security and hiring arrangements into conformity with the Act. We have been further advised that unions and employers are also reviewing such arrangements in light of the Board's decision in *Mountain Pacific Chapter of the Associated General Contractors, Inc.* (119 NLRB No. 126-A, released April 1, 1958), which established certain legal requirements for exclusive hiring arrangements.
>
> In view of these circumstances, a further extension of time beyond June 1, 1958, is warranted so

> that the parties may have sufficient opportunity to complete their negotiations in an orderly and informed manner. We have therefore extended to September 1, 1958, the period during which this Agency will withhold full application of the *Brown-Olds* reimbursement remedy where the parties voluntarily and diligently correct their union-security and hiring arrangements.

Thereafter, on August 19, 1958, the General Counsel wrote to the Building Trades Employers and Unions advising that, while there would be no general extension of the moratorium beyond September 1, 1958, the *Brown-Olds* remedy might be withheld if compliance were achieved by November 1, 1958, by those employers and unions currently engaged in "genuine efforts" in that direction (5 CCH Lab. Law. Rep. ¶50,103 (old edition)):

> On February 7, 1958, this Agency announced that during the period from March 1 to June 1, 1958, it would withhold full application of the *Brown-Olds* reimbursement remedy where employers and unions voluntarily bring their union-security and hiring arrangements into conformity with the provisions of the Labor Management Relations Act of 1947, as amended. On April 23, 1958, the period during which this announced policy would apply was extended to September 1, 1958. This extension was based, in part, on the vigorous undertaking by a large number of unions and employers to comply with the above policy and on the desire to provide the parties with a sufficient opportunity to review their agreements in light of the Board's decision in *Mountain Pacific Chapter of the Associated General Contractors, Inc.*, (119 NLRB No. 126-A, released April 1, 1958, which established certain legal requirements for exclusive hiring arrangements).

and to complete their negotiations in an orderly and informed manner.

In supplementation of the foregoing and, in accord with our announced desire to cooperate with and to assist the parties in whatever way possible in this matter, the Office of the General Counsel recently issued a statement with regard to union hiring halls and referral systems in which comment was made on various questions which had been raised by unions, employers and other interested parties as to the scope and implications of the Board's *Mountain Pacific* decision.

Since the issuance of that statement we have received numerous communications which demonstrate that many employers and unions are still in the process of renegotiating their agreements in an attempt voluntarily to conform such agreements with the Act but, that due to unavoidable delays inherent in such negotiations, and the complex problems involved, appropriate new agreements, in many instances, will not be executed by September 1.

Under all the circumstances, we have determined that no general extension of the policy of withholding the full application of the *Brown-Olds* remedy beyond September 1 is warranted. However, where the parties have initiated steps and have made genuine efforts to correct their union security and hiring arrangements prior to the September 1 deadline, the full application of the remedy may be withheld provided that conformity with the Act is achieved by November 1, 1958.

You may be assured of our continued cooperation with your efforts to conform your union security and hiring arrangements to the requirements of the Act.

Then, on October 31, 1958, one day before the expiration of the November 1 deadline, the Board entered its

refund order in *Los Angeles-Seattle Motor Express, Inc.*, 121 NLRB 1629. It is this order which is before this Court in No. 85. It is No. 85 which is the case in which the Board for the first time based a refund order upon the invalidation of a hiring hall agreement because of the omission of the three requirements from it.

The Board thus gave point to its General Counsel's threat that, if compliance were not effectuated during the moratorium, the penalty would be imposition of the *Brown-Olds* remedy. As the General Counsel stated in an address at the 1959 Southeast Trade Exposition on March 21, 1959, "It was not until the eve of the November 1 deadline that the Board, in the *Los Angeles Seattle Motors* case, linked *Mountain Pacific* to the *Brown-Olds* rationale" (mimeo. copy, p. 6). He stated in the same address that "The subsequent history of the *Mountain Pacific* decision has been, in large part, a concerted program by this Agency to encourage appropriate affirmative action by the contracting parties to conform their collective agreements and hiring practices to the requirements of *Mountain Pacific*. In this respect, the major spur has been the so-called *Brown-Olds* remedy . . ." (*id.* at p. 5). The spur was identified as "imposing a liability which may involve substantial sums of money" (*id.* at p. 7); he stated that "deterrence is the underlying consideration" (*id.* at p. 8); he described the moratorium as the period of "reprieve" (*id.* at p. 6).

This theme has been emphasized by the General Counsel in repeated speeches. In an address to the Building Industry Employees of New York State on June 27, 1958, he stated: "The purpose of the Board in fashioning the *Brown-Olds* reimbursement remedy is to effectuate the policies of the Act by prevailing

upon employers and unions to correct their illegal union-security arrangements" (42 LRRM 101, 103). In an address to the Illinois State Bar Association on November 7, 1958, he referred to the *Brown-Olds* remedy as "the first time employers and unions were to be held liable in a monetary sense for illegal union security or hiring arrangements. This liability potentially involves substantial sums of money . . ." (mimeo. copy, p. 4).

But the frankest avowal of the coercive and punitive character of the *Brown-Olds* remedy was given by the General Counsel in an address to the Rutgers University Conference on September 30, 1958. He stated that the "use that has been made of this extraordinary remedy . . . demonstrates vividly the capabilities of administrative pressure and persuasion . . ." (mimeo. copy, p. 6). He observed that "if employers and unions are to avoid serious consequences, these illegal arrangements must be eliminated. Liability potentially involves substantial sums of money . . ." (*id.* at p. 7). He stated that, as the parties became aware of the "serious monetary risk" they ran, they undertook to conform their agreements to the Board's requirement, and during this time "over the heads of the parties hung this statutory sword of Damocles—the constant awareness that *Brown-Olds* would be applied in full" (*ibid.*). He concluded that, in withholding the refund remedy during the period of the moratorium and threatening to impose it thereafter, "we paid heed to the homely adage of one of our very own citizens, who practiced what he preached at the turn of this twentieth century. I refer to President 'Teddy' Roosevelt. He carried a 'big stick' and with it he went far. We speak softly and carried a 'big sword,' and the results to date have been heartening" (*id.* at p. 8).

These sentiments were echoed by Board Member John H. Fanning who, in referring to the current application of the refund order, stated that the Board "put teeth into the law . . ."[36] He later referred to it as the "stinger."[37] Board Member Joseph A. Jenkins reported that the Board "decided that the law must be observed and a remedy provided which would cause compliance therewith. * * * [It] thereafter applied to unions and companies the *Brown-Olds* reimbursement remedy, in order to interest companies and unions in the problem of observing the law."[38] And he later repeated that:[39]

> . . . in order that the construction industry and the unions affected thereby would pay some attention to what the Labor Board was saying we devised what is known as the *Brown-Olds* remedy.
>
> The theory behind the *Brown-Olds* remedy is that we'll indicate to people that in the event they do not comply with the laws enunciated by Congress, we will require the refund of dues and assessments illegally exacted.

It is patent that the Board has put the refund order to a use which is at war with settled limitations upon its exercise of remedial power. *National Labor Relations Board* v. *District 50, United Mine Workers*, 355

[36] Address to the American Society for Personnel Administration at Jacksonville, Florida, February 6, 1959, p. 8.

[37] Address, Union Shops and Hiring Halls, The Third Yale Law School Alumni Day, April 25, 1959, p. 15.

[38] Address to the Contracting Plasterers and Lathers International Association, Washington, D. C., June 3, 1959, 44 LRRM 71, 72.

[39] Address to the Building Industry Employers of New York State, Lake Placid, New York, June 27, 1959, p. 9.

U.S. 453, 458, 463. It is patent that the Board is exercising punitive power, although its "power to command affirmative action is remedial, not punitive.", *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, 236. It is patent that the Board is imposing a penalty to coerce compliance, but the "Act does not prescribe penalties or fines." *Republic Steel Corp.* v. *National Labor Relations Board*, 311 U.S. 7, 10. And when the Board states, as it does, that the refund remedy is appropriate "because it provides not only a deterrent to future violations but an incentive to future compliance" (*Local 425, United Association*, 125 NLRB No. 107, 45 LRRM 1223, 1224), it suffices to say, with this Court, that "it is not enough to justify the Board's requirements to say they would have the effect of deterring persons from violating the Act. That argument proves too much, for if such a deterring effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end." *Republic Steel Corp.* v. *National Labor Relations Board*, 311 U.S. 7, 12. "Imposition of fines or jail sentences upon employers or unions would also be a deterrent, so far as such sanctions can act as a deterrent. But a fine is clearly the imposition of a penalty and the Labor Board is not authorized to impose penalties." *National Labor Relations Board* v. *United States Steel Corp.*, 278 F. 2d 896, 900 (C.A. 3), certiorari pending, No. 228, October Term 1960.

IV. RELIANCE UPON VIRGINIA ELECTRIC AND POWER CO. v. NATIONAL LABOR RELATIONS BOARD TO SUPPORT THE CURRENT VERSION OF THE REFUND ORDER IS MISPLACED.

The Board[40] and the court below (R. 118-119) rely upon this Court's decision in *Virginia Electric and Power Co. v. National Labor Relations Board*, 319 U.S. 533, to support the use to which the current version of the refund order is put. The reliance is misplaced. All this Court decided was that a refund order was within the Board's power and that exercise of the power was within the Board's discretion in the particular circumstances of that case. But the circumstances of *Virginia Electric* are so different from those in this case as to furnish no fair support for the result reached here. Thus the ruling circumstance in *Virginia Electric*, which controlled the evaluation of every other factor, was "that the Company was responsible for the creation of the I.O.E. [the contracting union] by providing its initial impetus and direction and by contributing support during its critical formative period." 319 U.S. at 540. The company-dominated character of the contracting union is at the heart of *Virginia Electric*.[41] Even as to company-dominated unions the Court declined to lay down a blanket rule. Referring to eleven preceding decisions of five Courts of Appeals, which had declined to approve refund orders, the Court stated "We need not now examine the various situations that were before the Circuit Courts of Appeals in the cases collected in Note 1, *ante*, or con-

[40] *Brown-Olds Plumbing & Heating Corp.*, 115 NLRB 594, 600; *Local 125, United Association*, 125 NLRB No. 107, 45 LRRM 1223, 1224 and n. 6.

[41] See *National Labor Relations Board v. McGough Bakeries Corp.*, 153 F. 2d 420, 425 (C.A. 5); cf. *National Labor Relations Board v. Clinchfield Coal Corp.*, 145 F. 2d 66, 73 (C.A. 4).

sider hypothetical possibilities. We decide only the case before us and sustain the power of the Board to order reimbursement in full under the circumstances here disclosed." 319 U.S. at 545.[42] "It is thus worthy of note that in the *Virginia Electric* case the Court did not undertake to disapprove any of the eleven decisions of the five circuits cited in its first footnote, all of which disapproved Board orders requiring reimbursement of check-off dues." *Morrison-Knudsen Co. v. National Labor Relations Board*, 276 F. 2d 63, 76 (C.A. 9).

Plainly the Court has laid down no blanket rule authorizing a refund under any circumstances or for a punitive purpose. The controlling factor of domination present in *Virginia Electric* is absent here. It cannot be said here, as it was in *Virginia Electric*, that the union is the employer's "creature" (319 U.S. at 540), that the employer imposed upon the employees "the cost of maintaining an organization which he has dominated" (*id.* at 541), that the union had "an employer-dominated beginning" and the employer "seized upon" the closed-shop and check-off "to establish the . . . [union] firmly" (*id.* at 542), that the union is "a type of organization which Congress has characterized as detrimental to the interests of employees and provocative of industrial unrest" (*id.* at 544),[43] and that the

[42] Of the preceding cases, the most cogently reasoned are *Western Union Tel. Co. v. National Labor Relations Board*, 113 F. 2d 992, 997-998 (C.A. 2), and *National Labor Relations Board v. J. Greenebaum Tanning Co.*, 110 F. 2d 984, 988-989 (C.A. 7).

[43] The United Brotherhood of Carpenters is composed of 3,000 local unions with a membership of 835,000. Directory of National and International Labor Unions in the United States, 1959, Bull. No. 1267, U.S. Dept. of Lab., Bur. Lab. Stat., 33 (1959).

moneys went "into the treasury of the Company's creature to accomplish purposes the Company evidently believed to be to its advantage" (*ibid.*).

In a word, in the case of company domination, "the union is an illegitimate union from the beginning. Its existence is illegal. The dues themselves are the fruits of the unfair labor practice for, in the absence of the unlawful practice, there would have been no union; a fortiori, there would have been no dues paid to it. Reimbursement is simply a way of pulling the unlawful organization up by the roots. An analogous situation is the annulment of a marriage." *National Labor Relations Board* v. *United States Steel Corp.*, 278 F. 2d 896, 899 (C.A. 3), certiorari pending, No. 228, October Term 1960.[11]

[11] As we have said, even in the case of company domination the propriety of a refund order is not automatic, and its enforcement has been denied subsequent to *Virginia Electric*. *National Labor Relations Board* v. *Sheild-Brown Mfg. Co.*, 213 F. 2d 163, 170-171 (C.A. 7).

Another situation should be distinguished. The rationale of *Virginia Electric* has been extended to justify a refund order in cases of active and widespread assistance of a union by an employer which, although short of domination, is deemed sufficiently serious to impair effectively the union's independence, especially when considered in conjunction with an invalid union security clause obligating the employees to pay union dues and fees as a condition of employment. This extension, apparently at first sparing and circumspect, seems recently to have dilated swiftly, perhaps under the momentum of the Board's use, as in this case, of the refund order where neither domination nor assistance is shown. Sometimes courts of appeals have set aside refund orders in assistance situations. *National Labor Relations Board* v. *Adhesive Products Corp.*, 258 F. 2d 403, 408-409 (C.A. 2); *National Labor Relations Board* v. *Halben Chemical Co., Inc.*, 279 F. 2d 189 (C.A. 2); *National Labor Relations Board* v. *McGough Bakeries Corp.*, 153 F. 2d 420, 425 (C.A. 5); *National Labor Relations Board* v. *Braswell Motor Freight Lines*, 213 F. 2d 208 (C.A.

Virginia Electric and this case are thus poles apart. Requiring the refund of fees and dues paid to a company-dominated union in conjunction with its dissolution has nothing in common with ordering a refund of fees and dues paid to a union whose authority to exist and function and to represent employees is altogether unquestioned.

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5). Sometimes courts of appeals have enforced such orders. *National Labor Relations Board* v. *Local 294, International Brotherhood of Teamsters*, 279 F. 2d 83, 86-88 (C.A. 2); *National Labor Relations Board* v. *Revere Metal Art Co., Inc.*, 46 LRRM 2121, 2123-24 (C.A. 2, May 6, 1960); *Paul M. O'Neill International Detective Agency, Inc.* v. *National Labor Relations Board*, 46 LRRM 2503, 2511-12 (C.A. 3, June 22, 1960); *Dixie Bedding Co.* v. *National Labor Relations Board*, 268 F. 2d 901, 907 (C.A. 5); *National Labor Relations Board* v. *Broderick Wood Products Co.*, 261 F. 2d 548, 558-559 (C.A. 10); *National Labor Relations Board* v. *General Drivers Local No. 886*, 264 F. 2d 21 (C.A. 10); *National Labor Relations Board* v. *Parker Brothers*, 209 F. 2d 278 (C.A. 5); *cf.*, *National Labor Relations Board* v. *Spicuak*, 179 F. 2d 695, 702 (C.A. 3), in which "the point was not argued by counsel" (*National Labor Relations Board* v. *United States Steel Corp.*, 278 F. 2d 896, 902 (C.A. 3), *certiorari pending*, No. 228, October Term 1960). The apogee seems to have been reached in basing a refund order exclusively upon the union security provision of the agreement, found to be invalid solely because of the contracting union's lack of majority when the original agreement was entered into, and having the refund run in favor of all employees covered at any time by the original and any successor agreement. *Local Lodge No. 1424* v. *National Labor Relations Board*, 264 F. 2d 575, 582 (C.A.D.C.), reversed on other grounds, 362 U.S. 411. Whether or not the Board will order a refund in an assistance situation, and whether a court of appeals will enforce or set aside such an order, does not appear to rest upon much more than impressionism.

Domination and assistance aside, refund orders have been entered in favor of specific employees found in their particularized situations to have been individually coerced into paying dues and fees. *E.g.*, *National Labor Relations Board* v. *Local 404*, 205 F. 2d 99, 101, 102, n. 1 (C.A. 1), enforcing 130 NLRB 801, 809, 811, 812; *National Labor Relations Board* v. *Local 420, United Association*, 259 F. 2d 327 (C.A. 3).

CONCLUSION

For the reasons stated the judgment should be reversed and the case remanded to the Court of Appeals with directions to set aside that part of the Board's order which requires the refund of "dues, non-membership dues, assessments, and work permit fees."

Respectfully submitted,

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